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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAVID POPIK, on behalf himself and all others similarly situated, Plaintiff, v. APPLE INC., AT&T MOBILITY LLC, and DOE DEFENDANTS 1-10 Defendants.	Case No. CV 10-02928 PVT **CLASS ACTION** **COMPLAINT FOR:** **1. VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT ("CLRA"), Civil Code §1750 et seq.;** **2. VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAWS ("UCL"); Bus. & Prof. Code §17200 et seq.;** **3. VIOLATION OF THE FALSE ADVERTISING LAWS ("UCL"); Bus. & Prof. Code §17500 et seq.;** **4. BREACH OF IMPLIED WARRANTY** **5. BREACH OF WARRANTY (SONG-BEVERLY ACT), Civil Code §1790 et seq.;** **DEMAND FOR JURY TRIAL**

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BY FAX

Plaintiff David Popik, on behalf of himself and all others similarly situated (collectively "Plaintiffs"), allege the following upon information and belief based upon investigation of counsel and published reports, except to his own acts, which he alleges upon personal knowledge:

JURISDICTION AND VENUE

1. This Court has diversity jurisdiction over this class action pursuant to 28 U.S.C. § 1332 as amended by the Class Action Fairness Act of 2005 because the matter in controversy exceeds $5,000,000, exclusive of interest and costs, and is a class action in which some members of the class are citizens of different states than the Defendants. *See* 28 U.S.C. § 1332(d)(2)(A).

2. This Court also has personal jurisdiction over Defendants because Defendants are authorized to do business, and currently do business, in this state.

3. Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391 because Defendant Apple Inc. is headquartered in this District and is subject to personal jurisdiction and a substantial portion of the conduct complained of herein occurred in this District.

PARTIES

4. Plaintiff David Popik ("Plaintiff") is an individual residing at all times mentioned herein in the County of Los Angeles, State of California.

5. Defendant Apple Inc. ("Apple") is a California corporation with its headquarters and principle place of business in Cupertino, California.

6. Defendant AT&T Mobility LLC ("AT&T") is a Delaware corporation with its principle place of business in Atlanta, Georgia. AT&T maintains extensive contacts with the State of California, including significant business operations in the billions of dollars, tens of thousands of employees, and hundreds of retail stores.

7. The acts alleged in this complaint that have been committed by Defendants were authorized, ordered or done by their officers, agents, employees or

representatives while actively engaged in the management of the Defendants' businesses.

8. The true names and capacities of the Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are currently unknown to Plaintiffs, who therefore sue such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiffs will seek leave of Court to amend this Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

9. At all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course of scope of said agency and/or employment with the full knowledge and consent of each of the other Defendants. Each of the acts and/or omissions complained of herein were alleged and made known to, and ratified by, each of the other Defendants.

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FACTUAL ALLEGATIONS

10. This action concerns the purchase by Plaintiff of an iPhone 4 manufactured by Apple, and sold at retail through Apple, AT&T, and a limited number of other retailers. The iPhone 4 is available in the United States exclusively for use with an AT&T cellular service account. The iPhone 4 sold in the United States is locked to AT&T as a carrier and cannot be used with any other cellular service provider.

11. Apple announced the iPhone 4 at its Word Wide Developers Conference ("WWDC") on June 7, 2010 during the keynote address by Apple's CEO, Steve Jobs ("Jobs").

12. One of the key points emphasized by Jobs was the new design of the iPhone 4, along with the "brilliant engineering" of its antenna system and its "extraordinary build quality."

13. More specifically, Jobs stated the following regarding the antenna system during the keynote:

Now, because there have been a few photos around, people have asked, what's this? What are these lines? These don't seem like Apple. Well, it turns out, there's not just one of them, there's three of them. And they are part of the structure of the phone — the stainless steel band is the structure of the phone. These is some brilliant engineering — we use that stainless steel band as part of the antenna system. It's got integrated antennas right in the structure of the phone — it's never been done before and it's really cool engineering. Stainless steel for strength. Glass on the front and back. Integrated antennas, and extraordinary build quality.

14. The reality is, however, that this "brilliant" antenna system suffers from a significant defect.

15. Plaintiff purchased iPhone 4 on the date of its release.

16. After using the iPhone 4, Plaintiff realized that the product was in fact defective and Apple has now acknowledged this defect. As is now being reported on various internet websites and blogs, when the iPhone 4 is held in a normal grip using the left hand, the phone suffers significant cellular signal degradation. Some reports have attributed this to the "line" on the left side of the phone separating the WiFi and Cellular antennas being shorted by being in contact with the user's skin, although this explanation has not been confirmed by Apple. (See Exhibit A attached hereto)

17. Although this is a significant defect, leading to a degradation and loss of the iPhone 4's primary functionality, namely, use as a cellular telephone, according to internet reports when a user e-mailed Jobs asking "What's going to be done about the signal dropping issue. Is it software or hardware?" Jobs

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wrote back stating "Non issue. Just avoid holding it in that way." (See Ex. A)

18. The same internet reports state that using with iPhone 4 in conjunction with Apple's "bumper," which is sold separately for $29, completely eliminates this issue. (See Ex. A).

19. Apple's apparent official response to these reports states: "Gripping any phone will result in some attenuation of its antenna performance with certain places being worse than others depending on the placement of the antennas. This is a fact of life for every wireless phone. If you ever experience this on your iPhone 4, avoid gripping it in the lower left corner in a way that covers both sides of the black strip in the metal band, or simply use one of many available cases" (See Ex. A)

20. At no point prior to purchasing the iPhone 4 was Plaintiff informed by any Defendant that in order to use his phone without suffering significant signal degradation he would either 1) have to hold his phone in an unnatural position or 2) purchase Apple's "bumper" which covers that location.

21. Plaintiff has suffered damages in that he now owns a phone for which he is required to purchase a "bumper" or hold the phone at an unnatural position in order to use it without significant signal degradation. Further, Plaintiff has further suffered damages in that he has spent time, effort and money in acquiring the new phone, entering into a new two-year contract with AT&T, and transferring data and applications to his new phone, only to be now informed that it is defective.

CLASS DEFINITIONS AND CLASS ALLEGATIONS

22. Plaintiff brings this action on behalf of himself, on behalf of all others similarly situated, and on behalf of the general public, and as members of the class or subclasses (collectively referred hereafter as the "Class") defined as follows:

(1) California Class: The class that Plaintiff seeks to represent ("the

California Class") consists of all persons who are citizens or residents of California and purchased an iPhone 4. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers and directors of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case, and such judge's immediate family and courtroom staff.

(2) Nationwide Class: The class that Plaintiff seeks to represent ("the Nationwide Class") is defined to include all persons who purchased an iPhone 4 in the United States. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers and directors of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case, and such judge's immediate family and courtroom staff.

23. Specifically excluded from the proposed Class are Defendants, any entities in which Defendants have a controlling interest, the officers, directors, affiliates, legal representatives, successors, subsidiaries and/or assigns of Defendant, the judge or judges presiding over this action, the presiding judge's immediate family members, and the presiding court's clerks and staff.

24. This action is brought and may be properly maintained as a class action pursuant to the provisions of Federal Rule of Civil Procedure 23(a)(1)-(4) and 23(b)(1)-(3). This action satisfies the numerosity, typicality, adequacy, predominance and superiority requirements of those provisions.

25. [Fed. R. Civ. P. 23(a)(1)] The Class is so numerous that the individual joinder of all of its members is impractical. While the exact number and identities of Class members are unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff is informed and

believes the Class includes well over 1 million of members. Plaintiffs allege that the Class may be ascertained by the records maintained by Defendants in that each original purchaser of the iPhone 4 could only have purchased them through an Apple Store, an AT&T store, or through limited retail outlets. Further, each original purchaser would have been required to either enter into a new contract or renew an existing contract as part of the purchase process.

26. [Fed. R. Civ. P. 23(a)(2)] Common questions of fact and law exist as to all members of the Class which predominate over any questions affecting only individual members of the Class. These common legal and factual questions, which do not vary from class member to class member, and which may be determined without reference to the individual circumstances of any class member, include, but are not limited to, the following:

(a) Whether Defendants had a duty disclose the product defect;

(b) Whether representations made by Defendants were false or had a tendency to deceive;

(c) Whether the product is, indeed, defective;

(d) Whether Defendants' conduct violates the CLRA or other laws;

(e) Whether Defendants' conduct is "unfair" under Section 17200;

(f) Whether Defendants' advertising is misleading;

(g) Whether Defendants breached their implied warranty;

(h) Whether Defendants' knew of the product's defect at the time it advertised and sold the product;

(i) Whether Defendants violated the Song-Beverly Act;

(j) Whether, as a result of Defendants' misconduct, Plaintiff and the Class are entitled to damages, restitution, equitable relief and other relief, and the amount and nature of such relief.

27. [Fed. R. Civ. P. 23(a)(3)] Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs and all members of the Class have sustained

injury and are facing irreparable harm arising out of Defendants' common course of conduct as complained of herein. The losses of each member of the Class were caused directly by Defendants' wrongful conduct as alleged herein.

28. [Fed. R. Civ. P. 23(a)(4)] Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs have retained attorneys experienced in the prosecution of class actions, including complex consumer and mass tort litigation.

29. [Fed. R. Civ. P. 23(b)(3)] A class action is superior to other available methods of fair and efficient adjudication of this controversy, since individual litigation of the claims of all Class members is impracticable. Even if every Class member could afford individual litigation, the court system could not. It would be unduly burdensome to the courts in which individual litigation of numerous issues would proceed. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same complex factual issues. By contrast, the conduct of this action as a class action, with respect to some or all of the issues presented herein, presents fewer management difficulties, conserves the resources of the parties and of the court system, and protects the rights of each Class member.

30. [Fed. R. Civ. P. 23(b)(1)(A)] The prosecution of separate actions by thousands of individual Class members would create the risk of inconsistent or varying adjudications with respect to, among other things, the need for and the nature of proper notice which Defendants must provide to all Class members.

31. [Fed. R. Civ. P. 23(b)(1)(B)] The prosecution of separate actions by individual class members would create a risk of adjudications with respect to

them that would, as a practical matter, be dispositive of the interests of the other Class members not parties to such adjudications or that would substantially impair or impede the ability of such non-party Class members to protect their interests.

32. [Fed. R. Civ. P. 23(b)(2)] Defendants have acted or refused to act in respects generally applicable to the Class, thereby making appropriate final and injunctive relief with regard to the members of the Class as a whole.

FIRST CAUSE OF ACTION

AGAINST ALL DEFENDANTS:

VIOLATION OF CALIFORNIA'S *CONSUMERS LEGAL REMEDIES ACT*

33. Plaintiff hereby incorporates, as if set forth in full, each and every preceding and subsequent allegation in this complaint.

34. The Defendants' acts and omissions violate the following portions of the California *Consumers Legal Remedies Act*:

a. in violation of Civil Code §§ 1770(a)(2) and/or §§ 1770(a)(3), Defendants have failed to disclose the existence of the product defect and Defendants have failed to put any sort of warning or disclaimer on their packaging or its website of the existence of the defect;

b. in violation of Civil Code §§ 1770(a)(5), Defendants have represented that its products offered have certain characteristics and/or benefits, when in fact they do not;

c. in violation of Civil Code §§ 1770(a)(7), Defendants have represented that the products offered are of a particular standard when they actually are not;

d. in violation of Civil Code §§ 1770(a)(9), Defendants have advertised its products with the intent not to sell them as advertised;

e. in violation of Civil Code §§ 1770(a)(14), Defendants have represented that a transaction to purchase their products involves certain rights, remedies, or obligations when in fact, it does not, or it is prohibited by law; and

f. in violation of Civil Code §§ 1770(a)(16), Defendants have represented that the subject of a transaction to purchase its products offered for sale has been supplied in accordance with a previous representation when it has not.

35. Plaintiff and the members of the Class risk irreparable injury as a result of the Defendants' acts and omissions in violation of the CLRA and these violations present a continuing risk to the class and members of the public.

36. Pursuant to Section 1782 of the CLRA, Plaintiff intends to notify Defendants in writing of the particular violations of Section 1770 of the CLRA (the "Notice Letter"). If Defendants fail to comply with Plaintiff's demands within thirty days of receipt of the Notice Letter, pursuant to Section 1782 of the CLRA, Plaintiff will amend this Complaint to further request damages under the CLRA.

37. Plaintiff has suffered economic damage as a result of Defendants' violations of *Civil Code* § 1770.

SECOND CAUSE OF ACTION

AGAINST ALL DEFENDANTS:

VIOLATION OF THE UNFAIR COMPETITION LAWS

38. Plaintiff hereby incorporates, as if set forth in full, each and every preceding and subsequent allegation in this complaint.

39. California *Business and Professions Code* § 17200 *et seq*., also known as the California Unfair Competition Law ("UCL"), prohibits acts of "unfair competition," including any unlawful, unfair, fraudulent or deceptive business

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act or practice as well as "unfair, deceptive, untrue or misleading advertising." Defendants violated Section 17200 *et seq.* by representing on its website that the product being purchased was

40. As a direct and proximate result of Defendants' illegal business practices, Plaintiff and the members of the Class have suffered injury and have lost money or property.

41. The illegal business practices described herein present a continuing threat to Plaintiff, the Class and members of the public in that Defendants persist and continue to engage in these practices, and will not cease doing so unless and until forced to do so by this Court. Defendants' conduct will continue to cause irreparable injury to Plaintiff and the Class unless enjoined or restrained.

THIRD CAUSE OF ACTION

AGAINST ALL DEFENDANTS:

VIOLATION OF THE FALSE ADVERTISING LAWS

42. Plaintiff hereby incorporates, as if set forth in full, each and every preceding and subsequent allegation in this complaint.

43. *Business and Professions Code* § 17500 provides that "[i]t is unlawful for any ... corporation ... with intent ... to dispose of ... personal property ... to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated ... from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading...."

44. As a direct and proximate result of Defendants' misleading advertising, Plaintiffs and the members of the Class have suffered injury in fact and have

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lost money or property.

45. The misleading advertising described herein presents a continuing threat to Plaintiff and the Class in that Defendants persist and continue to engage in these practices, and will not cease doing so unless and until forced to do so by this Court. Defendants' conduct will continue to cause irreparable injury to Plaintiff and the class unless enjoined or restrained.

FOURTH CAUSE OF ACTION

AGAINST ALL DEFENDANTS:

BREACH OF IMPLIED WARRANTY

46. Plaintiff hereby incorporates, as if set forth in full, each and every preceding and subsequent allegation in this complaint.

47. Defendants impliedly warrant that the products being sold will function properly for its intended purpose, mainly, for use as a cellular telephone.

48. Defendants breached this implied warranty when Defendants manufactured and sold to the public a cellular telephone which experiences significantly degraded signal strength when being held normally and without a "bumper."

49. This implied warranty was also breached by Defendants because they failed to warn customers in any way that such behavior could occur and that Plaintiff and the members of the putative class would be required to buy additional products, such as the "bumper," in order to cure such defect.

50. Plaintiff, and every member of the classes alleged herein, have been similarly damaged as a result of this breach of warranty.

FIFTH CAUSE OF ACTION

AGAINST ALL DEFENDANTS:

BREACH OF THE SONG-BEVERLY ACT

51. Plaintiff hereby incorporates, as if set forth in full, each and every preceding and subsequent allegation in this complaint.

52. The Song-Beverly Act, California Civil Code § 1790 *et seq.* applies to

consumer goods for which there is an express warranty.

53. Defendants' statements made in ths advertising, marketing, and sales of their products, and by operation of law, constitute implied warranties that such items are merchantable and fit for their intended purpose.

54. Defendants breached these express and implied warranties by selling products which were defective for their intended purpose and required the subsequent purchase of an additional product, such as a "bumper," to make them fit for their intended purpose..

55. Further, Defendants have breached their express and implied warranties by refusing to correct or repair the defects on products they manufactured or sold.

56. As a result of Defendants' breach of warranties as set forth above, Plaintiff and members of the class have suffered damages in an amount to be determined at trial, including but not limited to the cost of having to purchase a "bumper" or similar product.

57. Pursuant to the provisions of California Civil Code § 1794, Plaintiff and the Class are entitled to damages plus interest thereon, recision, restitution and other legal and appropriate equitable relief, including an order enjoining Defendants from the unlawful practices described herein, as well as recovery of attorneys' fees and costs of litigation.

PRAYER FOR RELIEF

WHEREFORE, on behalf of himself and all others similarly situated, Plaintiff prays for the following relief:

1. An order certifying this action as a Plaintiff class action, as set forth herein above;
2. For compensatory damages as permitted by law;
3. For restitution;
4. For preliminary and permanent injunctive relief prohibiting Defendants

3. For restitution;

4. For preliminary and permanent injunctive relief prohibiting Defendants from continuing the wrongful practices alleged in the complaint;

5. For preliminary and permanent injunctive relief requiring Defendants to repair and/or replace the products;

6. For costs and attorneys' fees as permitted by law;

7. For such other and further relief as the Court may deem proper.

DATED: July 2, 2010

KIRTLAND & PACKARD LLP

By: ______________________
MICHAEL LOUIS KELLY
Counsel for Plaintiff and all others similarly situated

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury for all causes of actions so triable.

DATED: July 2, 2010

KIRTLAND & PACKARD LLP

By: MICHAEL LOUIS KELLY
Counsel for Plaintiff and all others similarly situated

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AFFIDAVIT OF DAVID POPIK

1. I, David Popik, submit this affidavit pursuant to §1780(d) of the Consumers Legal Remedies Act and declare the following.

2. I am a resident of Los Angeles county, California, and am a named plaintiff in the Complaint filed herewith.

3. This case is properly brought in Santa Clara County because defendant Apple Inc. is headquartered in Cupertino, California, which is within the county of Santa Clara.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed this 1st day of July, 2010, at Lawndale, California.

[signature]
David Popik